No. 14-1280

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IN THE

Supreme Court of the United States

JEFFREY J. HEFFERNAN,

Petitioner,

v.

CITY OF PATERSON, NEW JERSEY, ET AL.,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

May a public employee who has not exercised any First Amendment right bring a First Amendment retaliation claim?

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BRIEF FOR THE RESPONDENTS

Respondents respectfully request that this Court affirm the judgment of the Third Circuit in this case.

STATEMENT OF THE CASE

Petitioner Jeffrey Heffernan is a retired officer in the Paterson, New Jersey, police force. Respondents are the City of Paterson and two officials: the mayor and the chief of police. Petitioner sued respondents under 42 U.S.C. § 1983 alleging a violation of his First Amendment rights, seeking compensatory damages, punitive damages, and attorney's fees. The case has a long procedural history, most of which is no longer relevant. *See generally* BIO 2-11 (describing three rounds of proceedings before different district judges and ensuing appeals).

At this stage, the operative allegations are as follows. In 2006, the City's incumbent mayor ran for re-election. Petitioner was then a police detective, assigned to work in the office of the chief of police. A member of the force saw petitioner holding a lawn sign supporting the mayor's opponent; that person reported what he saw to another officer, who in turn reported it to the chief. The chief reassigned petitioner to another position in the police department.

Petitioner did not actually support the mayor's opponent, however. In fact, petitioner did not live in the city and could not vote in the election. He had merely picked up the lawn sign and dropped it off at his mother's home (without even placing it on her lawn), as a favor to her.

Petitioner sued respondents. (Although a few allegations are individualized, we refer to "respondents" generally for simplicity.) Petitioner did not assert a claim under the New Jersey Civil Rights Act, which provides a cause of action for an "attempt" to violate an individual's civil rights. N.J.S.A. 10:6-1. Instead, petitioner alleged that the transfer violated his First Amendment rights.

Petitioner alleges that the transfer was retaliation for his perceived support of the mayor's opponent. Respondents, by contrast, contend that the transfer was based on petitioner's political *activity*, not his views. Petitioner held a sensitive and neutral position due to his assignment in the office of the police chief and yet became improperly involved in the mayoral race. Respondents also assert that the transfer was not an actionable adverse employment action. But, as the case comes to this Court, we accept petitioner's allegations *arguendo*.

The precise legal theory underlying petitioner's First Amendment claim is unclear in the complaint. But over the course of the case, he has alleged that respondents violated his right to free speech and his right to political association. Regarding the latter, petitioner has also alleged that, even if he did not actually engage in political association, respondents violated the First Amendment because they transferred him based on the mistaken belief that he had.

As relevant here, the district court rejected these theories on summary judgment and dismissed the complaint. The court found that petitioner provided no evidence that he personally engaged in speech or

political association. Instead, the district court found that he was simply performing an errand for his mother. "Most importantly, *Heffernan himself* asserted that he had no political connection to [the opponent]." Pet. App. 44a (emphasis in original).

The district court then rejected petitioner's argument that he could state a First Amendment claim on the theory that, even if he had not engaged in political association, respondents mistakenly believed he had. That claim failed, the court held, because "a First Amendment retaliation claim must be premised on an actual exercise of First Amendment rights." Pet. App. 53a.

The Third Circuit affirmed. Preliminarily, the court agreed that the facts precluded petitioner's claim that respondents acted in retaliation for his actual exercise of his First Amendment rights. Petitioner's own "unambiguous testimony," the court explained, left "no room" for that factual assertion. Pet. App. 9a-10a.

The Third Circuit then rejected the theory that petitioner could state a First Amendment claim because respondents *believed* he had engaged in protected activity when they transferred him, even though he never did. That claim failed, the court held, because it would "eliminate a traditional element of a First Amendment retaliation claim – namely, the requirement that the plaintiff in fact exercised a First Amendment right." Pet. App. 11a.

The Third Circuit distinguished several appellate rulings that petitioner claimed had recognized such "perceived association" claims. Those decisions, the court explained, in fact properly recognized claims by

individuals who had suffered retaliation for their constitutionally protected decision to remain *politically neutral*. Petitioner, by contrast, had not engaged in any form of political association at all. Pet. App. 12a-13a. The Third Circuit's ruling thus would not endanger "the right to speak on a political issue, to associate with a political party, or to not speak or associate with respect to political matters at all." *Id.*

Petitioner sought certiorari. He pursued only his "perceived association" claim, expressly abandoning any claim to have actually engaged in protected speech or association. Thus, while petitioner claims that he was "a close personal friend" of the mayor's opponent, whom he "wanted ... to win," Pet. Br. 3, in this Court he accepts both lower courts' findings that he engaged in no political association related to the election. *See also infra* at 9-10 n.1.

This Court granted certiorari.

SUMMARY OF THE ARGUMENT

The premise of petitioner's First Amendment claim is that he did not engage in any speech or association protected by the First Amendment. He avowedly had no political association related to the mayoral race. But he alleges that the police chief believed he supported the opponent, and transferred him for that reason. Because the transfer was politically motivated, petitioner argues, it violated the First Amendment.

That argument is precluded by settled precedent. A political motivation for an adverse action is a *necessary* condition for petitioner's claim, but is not *sufficient*. This Court has uniformly held that a

public employee alleging that a disciplinary action violated her right to free speech or political association must first prove that she engaged in protected activity. If she does not, "it is unnecessary for [the court] to scrutinize the reasons for her discharge .... even if the reasons for the dismissal are alleged to be mistaken or unreasonable." *Connick v. Myers*, 461 U.S. 138, 146-47 (1983) (citations omitted).

Although petitioner contends that the Third Circuit erred because it deemed respondents' "mistake" to negate their liability, that is backwards. The court of appeals' straightforward holding was that petitioner's First Amendment claim failed because he did not engage in any First Amendment activity, a point unaffected by any "mistake." Meanwhile, it is petitioner who attempts to *create* liability out of respondents' mistaken impressions. All agree that, if the chief of police *correctly* understood that petitioner was not a supporter of the mayor's opponent, he could constitutionally transfer him for any reason or none at all. Petitioner thus has no First Amendment interest in his claim, and respondents' improper motivation is not sufficient to give him one.

Indeed, petitioner's position cannot be reconciled with the established regime for asserting this kind of First Amendment claim. For example, given petitioner's view that the employee need not have engaged in protected speech or association *at all*, presumably the employee need not prove that he spoke (1) non-disruptively (2) on a matter of public concern (3) outside his job responsibilities. *But see Garcetti v. Ceballos*, 547 U.S. 410 (2006). Petitioner

must also dispense with the established *Pickering* framework, under which the dispositive question is whether the employee's interest in the speech outweighs the government's interest in the orderly function of the public workforce. Because, on petitioner's view, the employee need not have engaged in speech at all, there is no free speech interest to weigh in the balance.

The few cases petitioner cites actually reject his position. He principally relies on *Waters v. Churchill*, 511 U.S. 661 (1994). The question in *Waters* was whether an employee who engages in constitutionally protected speech or association states a claim if the employer believed he did not engage in any protected activity. The plurality held that the employer is not liable if its conclusions were based on a reasonable investigation. But consistent with all of this Court's precedent, every member of the Court recognized that such a "good faith" defense is not even relevant unless the employee first proves that he engaged in protected activity. This makes perfect sense because, under the established two-part test, the presence of an improper motive is only the necessary *second* step: its presence alone does not create a claim. If this Court somehow reads this line of cases to say otherwise, those decisions should be overruled.

Petitioner's policy arguments would not justify departing from this Court's clear precedents, but they lack merit in any event. It is well settled that the Constitution generally leaves public employers free to manage their workforces. This Court's decisions thus reject efforts like this one, which seek to constitutionalize the employee grievance process.

But that is exactly what a decision recognizing petitioner's First Amendment claim would do, seriously disrupting the administration of public employment. Numerous claims that would have failed because the employee did not engage in constitutionally protected activity could now be brought on the theory that the employer mistakenly *thought* he had – for example, because of rumors regarding the employee's beliefs or association. And because this claim relies *entirely* on the employer's secret motivations, it will be largely impossible to defeat before expensive discovery and trial. Failed applicants for governmental positions could bring such claims as well, giving almost every disappointed government petitioner a plausible threat of suit.

This novel and destructive expansion of First Amendment doctrine is unnecessary, given that existing law provides extensive protections for public employees. The First Amendment protects all political views, including the decision to remain neutral. Its protections furthermore apply even if the employer misunderstands the precise nature of the employee's speech or association: For example, a Republican employee disciplined on the mistaken belief that he is a Democrat certainly has a viable constitutional claim. By contrast, petitioner's claim fails only because he did not engage in any protected speech or association *at all*.

Still other protections exist in a "powerful network of legislative enactments" and bargaining agreements. *Garcetti*, 547 U.S. at 425 (collecting citations). For example, New Jersey law provides a statutory right of action for an "attempt" to violate an individual's civil rights. N.J.S.A. 10:6-1 et seq. That

language may capture petitioner's claim that respondents sought to discipline him for political reasons, but petitioner omitted that cause of action from his complaint. Petitioner may have had recourse to such statutes or other civil service protections, but not the First Amendment.

ARGUMENT

I. Petitioner's First Amendment Claim Fails Because He Did Not Engage In Any Protected Activity.

A. Petitioner Has No Constitutional Claim Because Respondents Did Not Infringe His First Amendment Rights.

The premise of petitioner's First Amendment claim is that he did not engage in any activity protected by the First Amendment. If that sounds strange, that is because it is. Petitioner's theory is that, although the government did not actually infringe his First Amendment rights, he can state a claim – indeed, a claim for punitive damages – because the government *thought* it had.

That argument lacks merit. The court of appeals recognized that petitioner's argument would require it "to eliminate a traditional element of a First Amendment retaliation claim – namely, the requirement that the plaintiff in fact exercised a First Amendment right." Pet. App. 11a. Settled precedent provides that the employee's claim must be based on "an employee's actual, rather than perceived, exercise of constitutional rights." *Id.* (citations omitted). That rule extends to a case like this one, "where the employer's retaliation is

traceable to a genuine but incorrect or unfounded belief that the employee exercised a First Amendment right." *Id.*

Petitioner's contrary theory rests on the odd view that *the government*'s motives for the *subsequent* actions it has taken against him somehow affect the First Amendment status of *his own* prior acts, which he *already* undertook. Petitioner avowedly had no political association related to the election for city mayor: He did pick up a sign supporting the mayor's opponent; but he did so for his mother and – absent respondents' subsequent response – could not have claimed this to be an act of protected speech or political association at all. Petitioner's allegation is nonetheless that respondents transferred him because the police chief *wrongly* believed he supported the opponent. And because the transfer was politically motivated, he says, it violated the First Amendment, whether he was actually engaged in protected activity or not.[1]

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[1] The district court reviewed the summary judgment record and "found that Heffernan had failed to produce evidence that he actually exercised his First Amendment rights." Pet. App. 5a. On petitioner's appeal, the court of appeals expressly affirmed that ruling, recognizing that petitioner had "repeatedly disavowed" engaging in any actual association in "unambiguous testimony." *Id.* 9a-11a. Petitioner chose not to seek this Court's review of that holding. Thus, the premise of the case in this Court is that petitioner, who was not a city resident, simply remained politically agnostic. *See, e.g.*, Pet. 7 (question presented is whether the employee may "be disciplined because his supervisor *perceives a political association that does not in fact exist*" (emphasis added)); Cert. Reply 5 (arguing that the Court should not defer review to allow time for lower courts to

The force of this argument is driven by the gestalt reaction that "you can't do that" – *i.e.*, that a public employer cannot discipline an employee based on politics, and that there is something to be gained from punishing that motive wherever it can be found. But, quite apart from the doctrinal issues discussed below, there are three key problems with this view.

First, it does not track petitioner's personal interest in his own lawsuit at all. From petitioner's perspective, the fact that respondents were driven by politics is happenstance. Petitioner could only have a theoretical interest in retaliation against protected activity because *he has not engaged in any*. From his standpoint, the important feature of his claim is that respondents injured him by transferring him based on a mistake. But under settled law, that allegation does not make out a claim under the Constitution, which does not restrict the general management of public workforces. *See, e.g.*, *Connick*, 461 U.S. at 146-47.

To see this more clearly, it helps to recognize that the only reason petitioner's transfer even arguably implicates the First Amendment for him personally is because he *heard* it was politically motivated. If petitioner had never learned that fact, the effect of the transfer on him, and his personal First Amendment interests, would have been the

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consider issues related to misperceived political neutrality, because this case does not involve "those questions"). Accordingly, the Court need not decide whether petitioner's relationship with his friend would amount to protected association in other circumstances.

same – that is, none, because he had no First Amendment activity to protect in the first place. The same would be true if petitioner had not in fact picked up the sign, but the chief of police had transferred him after hearing a false rumor otherwise; or if respondents' reason for transferring him was pure mean-spiritedness, completely unrelated to the election or any other political consideration. In those examples, the transfer would have caused petitioner the same First Amendment injury as he suffered on the facts he alleges here: None at all.

Second, while petitioner suggests that it is important to root out the bad motive of political discipline, his rule actually does nothing to advance that goal. It is already settled that the First Amendment applies when the government disciplines a non-policymaking employee who engages in constitutionally protected speech or association. *See, e.g.*, *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716-17 (1996). When an employer takes adverse action against an employee based on the *mistaken* belief that the employee has engaged in speech or association, the employer *by definition* believes the conditions for a valid First Amendment claim exist and is either ignorant of this Court's precedents or has decided to violate them. For example, in this case, petitioner alleges that respondents believed they were transferring him for political reasons, in violation of settled law. If that is right, respondents would not have acted any differently if they had known about an additional rule prohibiting retaliation based on *misperceived* political affiliations (because, of course, they did not

know they were "mistaken"). So if respondents had known the rule petitioner advocates, they would have done nothing differently; petitioner's rule would not have helped to protect him in any way from bad motivations, nor would it protect anyone else.

Finally, it is important to note that petitioner's intuitive objection seriously overstates the constraints that the First Amendment imposes on public employers. "Politics" is an essential element of the democratic process generally, and so it is well accepted with respect to the governmental workforce, for example, that confidential and policymaking employees can be subject to hiring and termination on that basis. *See, e.g.*, *Branti v. Finkel*, 445 U.S. 507, 518 (1980). The Framers obviously never contemplated eliminating political considerations from government decision making, an effort that would interject the federal courts as the constant overseers of public employment. It is thus one thing to provide a claim to a particular class of employees who can show that they were engaged in precisely the kind of activity the Constitution protects, but quite another to give a claim to individuals who are *not* engaged in that activity because they think they can put their finger on a "bad motive" and thereby try to scrub it from all public decision making. The latter does not advance the cause of any person engaged in constitutionally protected activity, but – as further explained below – does allow a class of employees with no personal constitutional interest to bring suits that are difficult to defend and will substantially disrupt public workforces.

B. Petitioner Greatly Overstates The Breadth Of The Court Of Appeals' Ruling.

Relatedly, petitioner badly misunderstands what is at stake in this case by framing it as one in which respondents were allegedly excused from liability by their "mistake" in believing that petitioner was associated with the mayor's opponent. Pet. Br. 9. He asserts that "[r]espondents' factual mistake did not cure their constitutional mistake." *Id.* That view gets the case precisely backwards. The court of appeals did not think that respondents' misunderstanding of the facts was a defense. It never doubted that petitioner adequately alleged that respondents acted with an improper motivation, which caused them to transfer him and resulted in his injury. Petitioner's claim did not fail because he was not "politically active," *id.* 10, or provided "an insufficient level of support," *id.* 12. Instead, the court of appeals rejected petitioner's First Amendment claim on the obvious ground that he had not engaged in any activity protected by the First Amendment, Pet. App. 10a-11a; were that not true, petitioner would have a claim. As petitioner elsewhere acknowledges, the basis for the ruling below was that he "had not *actually engaged in any political association*," such that "his supervisors could not have abridged his freedom of association by punishing him." Pet. Br. 19.

Instead, it is petitioner who erroneously treats respondents' error as a dispositive factor. He argues that it is the basis for *imposing* liability. All agree that if respondents had accurately understood the facts – that is, if they knew that he was merely

picking up the sign for his mother – they would have been perfectly entitled under the Constitution to transfer him, because the Constitution is not concerned with family errands. Accordingly, the *only* role mistake plays in this case is to allow petitioner to create a new constitutional claim where no such claim would otherwise exist.

And because petitioner misunderstands the basis for the court of appeals' decision, he greatly overstates its relevance to public employment. To begin with, it is patently wrong to represent that, even with respect to employees who *do* exercise their right of speech and association, the ruling below "would allow the government to retaliate against employees for their speech on matters of public concern, so long as their supervisors misunderstood what the employees said." Pet. 11. The Third Circuit's ruling applies only in the context of employees who engage in no First Amendment protected activity. Pet. App. 11a-13a.

Further, this Court's precedents already protect public employees' conscious decisions to remain neutral as between political viewpoints, just as it protects their rights to associate with one political viewpoint or another. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 351 (1976). The court of appeals thus distinguished this case from "natural applications of the settled First Amendment principle that an employer may not discipline an employee based on the decision to remain politically neutral or silent." Pet. App. 12a (citations omitted). Nothing about the ruling below would endanger "the right to speak on a political issue, to associate with a political party, or

to not speak or associate with respect to political matters at all." *Id.* 13a.

But the constitutional protection afforded political neutrality does not aid petitioner. The court of appeals explained that petitioner "has not presented evidence that he was retaliated against for taking a stand of calculated neutrality. Instead, he argues that [respondents] demoted him on a factually incorrect basis." *Id.* The point of the court of appeals' ruling is that, if petitioner *were* an Independent and respondents mistakenly believed otherwise, he would have a claim; and likewise, his claim does not mystically arise from a mistake about his affiliation if he has no protected affiliation in the first place. Simply put, the mistake has nothing to do with whether he has a constitutionally protected right, and it is only respondents' position that is consistent on this front.

Further, the inquiry under the First Amendment is whether the employer acted on the basis of the employee's speech or association, at a high level of generality. The employer need not know – or even care – precisely what the employee said or believed. For example, if a public employee engages in speech on a matter of public concern, it is no defense that the employer did not know what he said but fired him upon merely hearing that he was speaking in the office or to the press. *See Waters v. Churchill*, 511 U.S. 661 (1994) (holding that employee has burden to prove that employer acted on the basis of speech or association, then employer may prove that after reasonable investigation it believed the employee had not engaged in protected activity). For that reason, it does not matter if the employer acts on a *mistaken*

understanding of precisely what the employee said or believed – all that matters is the *existence* of protected activity, and retaliation on that front.

Here, respondents made a "mistake" only in the very particular sense that they erroneously believed that petitioner had engaged in political association *at all*. This case is thus very different from one in which the employer alleges that a public employer got the *details* wrong – for example, that he engaged in constitutionally protected association with one political viewpoint (say, he was a Republican) but the employer "mistakenly" believed he supported another (a Democrat). If the employee has a political association – in that instance, his affiliation with the Republican Party – and the employer disciplines him for political reasons, the employee has stated the threshold elements of a claim. The fact that the employer makes a "mistake" about *which* political party the employee belongs to is no defense.

C. This Court's Precedents Squarely Hold That A Public Employee Must Establish At The Threshold That He Engaged In Speech Or Association Protected By The First Amendment.

Even if petitioner could plausibly claim that the First Amendment protects not only the actual exercise of associational rights, but also the *misperceived* exercise of speech and free association, the question in this case is not whether the government can jail someone based on the mistaken belief that he engaged in protected First Amendment activity – petitioner alleges only that he was transferred from one public job to another less

desirable government position. He thus raises an unconstitutional conditions claim, which is one step removed from the core of the constitutional protection. The case is yet further removed from the principal concerns of the First Amendment because petitioner raises his unconstitutional conditions claim in its most disfavored context: public employment, an area in which this Court has repeatedly recognized that First Amendment interests must give way to the government's countervailing need to operate its workforce without undue judicial intrusion. *See, e.g.*, *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2493 (2011); *Garcetti*, 547 U.S. at 418-19; *Connick*, 461 U.S. at 149.

Accordingly, correctly understood, petitioner's claim gives rise to a precise legal question: does a public employee who has not engaged in any activity protected by the First Amendment have a First Amendment right, redressable through a tort suit, not to be disciplined by a public employer who mistakenly believes he has? Put another way, can a public employee who has not exercised any First Amendment rights nonetheless state a First Amendment claim for damages? The answer to that question is "no."[2]

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[2] Because this case arises in the special context of public employment, the decision in this case will not dictate whether the Government may punish individuals, or deny them other kinds of government benefits, on the basis of perceived political association or other First Amendment activity.

As applied to state and local governments, the First Amendment provides in relevant part that the government shall make "no law . . . abridging the freedom of speech, . . . [or] the right of the people peaceably to assemble." U.S. Const. amend I. By definition, the government cannot "abridge" a "right" of an employee who does not even seek to exercise it. Petitioner identifies no historical evidence of any circumstance in which the Framers or this Court previously understood the First Amendment to operate any differently. The statute petitioner invokes to assert his cause of action, 42 U.S.C. § 1983, is similarly limited in relevant part to instances in which the plaintiff is "depriv[ed] of any rights . . . secured by the Constitution." Extending the right to bring tort suits under the Bill of Rights to public employees like petitioner who do *not* exercise the rights it enumerates demeans both the protections the Constitution provides to individuals and also the authority its other provisions reserve to the states and their constituent local governments to manage their internal affairs.

Consistent with the constitutional text, this Court's precedents make clear that a First Amendment claim arising from the discipline of a public employee begins with one threshold question: did the employee engage in constitutionally protected speech or association? If not, any further inquiry – which necessarily would intrude on the operations and prerogatives of government employers – is unnecessary. On petitioner's view, every one of this Court's decisions setting forth that threshold requirement, along with the hundreds (if not thousands) of lower court rulings applying the same

rule, were all wrong. What was previously regarded as the foundational feature of the employee's claim was actually irrelevant as a matter of law.

1. As least before this case, it was well settled and well understood that under this Court's precedents, "[a] court first determines whether the plaintiff's speech was expressed 'as a citizen' on a 'matter[] of public concern.' If it was not, the First Amendment claim fails." U.S. Br., *Garcetti v. Ceballos*, 547 U.S. 410 (2006), at 10 (quoting *Connick*, 461 U.S. at 140 (quoting, in turn, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968))). This Court's classic statement of the rule, in *Connick v. Myers*, all but rejects petitioner's argument in terms. If the employee has not engaged in what can

> be fairly characterized as constituting speech on a matter of public concern, *it is unnecessary for us to scrutinize the reasons for her discharge*. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review *even if the reasons for the dismissal are alleged to be mistaken or unreasonable*.

461 U.S. at 146-47 (emphasis added) (footnote and citations omitted).

Numerous precedents apply that rule. For example, the question in *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), was the proper standard to apply in so-called "mixed motive" cases in which the employer acted for multiple reasons, only one of which was the employee's speech. The Court held that in such a case – in which the employer's motivation is by definition a central feature – the employee must "show that *his conduct was constitutionally protected*, and that this conduct was a 'substantial factor'" in the employment decision. *Id.* at 287 (emphasis added) (footnote omitted). The government could then seek to defeat the claim by showing "that it would have reached the same decision . . . even in the absence of the protected conduct." *Id.*

More recently, this Court reaffirmed in *Garcetti v. Ceballos* that the "first" inquiry in such a case is "whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." 547 U.S. at 418 (citation omitted). In that case, the employee engaged in speech. But the Court held that employee had no personal First Amendment interest in that speech because it was made in the course of his job responsibilities. No further inquiry was required. But on petitioner's view, the case was not necessarily over. The same employee could proceed with his suit, and prevail, on the same facts, based on the allegation that the employer *mistakenly believed* that his non-protected speech was actually outside his job responsibilities. And the employer could well make such a mistake, as *Garcetti* itself recognized that the

bounds of the employee's duties may not be obvious from his job description. *Id.* at 424-25.

2. Beyond this Court's uniform articulation of the governing legal rule, petitioner's argument cannot be reconciled with the established structure under which such claims are resolved. Petitioner's assertion that his "would be a simple rule for courts to administer," Pet. Br. 10, and "a bright line rule," *id.* 19, is just a backhanded acknowledgment that he would eliminate several elements of the claim outright. This is not minor surgery; petitioner attacks well-settled law with a cleaver.

The fact that employees would no longer be required to prove that they engaged in political association or constitutionally protected speech is just the beginning. In a speech case, petitioner's logic would also require eliminating the requirements that the employee prove that he was acting outside of his ordinary job responsibilities and that he was speaking non-disruptively on a matter of public concern. Those are merely means to prove that the employee's speech was constitutionally protected. But on petitioner's view, none of these requirements has any logical relevance; the government's motivation is sufficient to transform his actions into an act of fully constitutionally protected speech or association, even if he has not spoken at all.

Also, what becomes of the famous *Pickering* doctrine, which provides that a public employee's speech is protected if his interest in expression outweighs the government's interest in managing the workplace? 391 U.S. at 568. Under the *Pickering* framework, "First, a court must determine whether the employee spoke 'as a citizen on a matter of public

concern'; if not, the First Amendment *provides no protection*." U.S. Br., *Lane v. Franks*, 134 S. Ct. 2369, at 12 (emphasis added). When the employee in petitioner's position has not even *engaged* in protected speech, he has no First Amendment interest to weigh in the balance. Yet petitioner insists that the employee will still prevail.

Petitioner's argument also cannot be reconciled with the related principle that a First Amendment claim arises only if the challenged adverse employment action is material. *Cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006) (in Title VII context, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse"); *Wrobel v. County of Erie*, 692 F.3d 22, 31-32 (2d Cir. 2012) (applying same rule to First Amendment retaliation claims); *Couch v. Bd. of Trustees of Mem'l Hosp. of Carbon Co.*, 587 F.3d 1223, 1238 (10th Cir. 2009) (same). Lesser actions are not actionable because they do not constitute a sufficient infringement upon the employee's rights of speech or association. *Id.* Imagine that petitioner actually *was* associated with the mayor's opponent and the chief of police had publicly criticized him for those views. By definition, those would be more direct infringements on protected associational rights than petitioner asserts in this case. But he would still have no First Amendment claim.

Illogically, petitioner's proposed rule recognizes a claim only for employees whose First Amendment rights have not been infringed *at all*, much less materially. It makes no sense to say that an employee asserting a traditional First Amendment

claim who actually engaged in constitutionally protected activity bears the burden of proving that the employer's conduct had a *material* effect on his rights, while relieving a set of employees who do not even engage in protected activity from showing how that (*non*)-exercise could have been materially affected by the adverse actions against them. The ironic result is that the plaintiff has burdens in cases in which he has actually exercised a protected right that do not apply if he avoided engaging in the actions that the Constitution protects.

Conversely, petitioner would substantially rework existing law by imposing a *greater* obligation on the employee to prove the employer's motivation. Presently, the employee need only prove that the public employer acted on the basis of the employee's speech or association. *See supra* at 16. As discussed, it makes no difference whether the employer misunderstood the details – such as with whom the employee associated. But not according to petitioner: For the employee to establish that the employer made a mistake, he would have to plead and prove what exactly the employer knew.

None of this makes any practical sense. According to petitioner, the employee no longer pleads and proves things he knows: that he engaged in protected speech or association and the nature of his interest in that expression. Instead, none of that matters and he instead must plead and prove the thing he is least likely to know: what precisely was in the employer's head. The result, as explained below, is to vastly multiply the cases that are hardest to prosecute and defend, while eroding the gatekeeper rule that fully distinguishes serious

assertions of constitutional rights from those that should not detain the courts or disrupt the operation of the public workforce.

II. Recognizing Petitioner's Claim Would Significantly Disrupt The Orderly Functioning Of The Public Workforce.

The radical change in settled law wrought by petitioner's rule would seriously disrupt governmental workplaces, vastly expanding public employers' exposure to litigation and complicating their ability to defend against those claims in court. Take three terminated public employees: one speaks on a matter of public concern but in a manner that is disruptive to the workplace; one speaks on a matter of private concern; and one does not speak at all in any relevant sense. None of them engaged in protected First Amendment activity. Thus, under existing law, none can threaten and bring a Section 1983 claim, because the employer can win by showing the absence of protected activity before getting into any fight about the employer's motivations. *See Connick*, 461 U.S. at 146, 151-52.

But according to petitioner, *all* of these employees can bring their claims. The first can say the employer *falsely* believed the speech was not disruptive; the second can say the employer *falsely* believed the speech related to a matter of public concern; and the third can say the employer *falsely* believed he had said something protected when he had not. The public employer will be required to defend *all* of these cases, including being subject to expensive and distracting discovery, in an effort to disprove a disputed fact about his motivations for

acting. Given how hard these kinds of subjective facts are to *dis*prove, the odds of avoiding summary judgment and being forced to trial or settlement are overwhelming. And all of these costs are being imposed in the name of the First Amendment, even though *everyone agrees* that none of these employees actually engaged in constitutionally protected free speech.

The range of things that could give rise to a claim that a public employer had a "mistaken" impression about the employee's political affiliation is almost limitless. As petitioner enthusiastically explains, such a claim could arise from "*anything* they might do, because there are so many ways of acting that can make coworkers suspect an affiliation with one party or the other," such as the radio stations they listen to, "[t]he jokes employees tell at work, the hobbies they pursue, [and] the kinds of music they listen to." Pet. Br. 26 (emphasis added). All that is required to move forward in such a suit is a rumor arising from any of those commonplace acts.

The adverse consequences of petitioner's rule are multiplied exponentially when one realizes that it would necessarily apply to every person who applies for a government job or contract, but does not get what he seeks. *See, e.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76-79 (1990). So the perfectly well-intentioned supervisor must worry not just about the times he disciplines one of the discrete set of employees under his oversight – which may occur rarely – but all the times he does not hire or contract with someone. And of course there can be twenty applicants (or more) for every single position that comes open. Take this case. According to petitioner,

every officer from both within and outside the city who applied to replace petitioner in the office of the chief of police, but did not get the job, could claim that respondents mistakenly thought that they too were supporters of the mayor's opponent or engaged in constitutionally protected speech.

It gets worse. To successfully state a claim, the plaintiff would not even have to prove that his perceived speech or association was the "but for" cause of his treatment, the typical standard in other areas of the law. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2524-25 (2013). Instead, a claim could arise – and proceed in court – if the employer's (mis)perceptions were merely a motivating factor; the employer would then bear the burden of proving that it would have taken the same action for legitimate reasons. *See Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977).

These "burden-shifting" dynamics radically change how these claims work in practice – allowing them to be transformed into all-purpose employment grievances only loosely tied to the First Amendment question at issue. Once an employee alleges that some false subjective belief about their political affiliations *partially* motivated the action against them, most cases will devolve into a dispute about whether the employer took similar actions against similar or worse employees. In that guise, the claimant can smuggle in non-constitutional disputes about whether they were treated worse than employees who were less qualified, with judges or juries entitled to *assume* that inferior treatment related to the alleged First Amendment motive

rather than the myriad other motivations that cause employers to disfavor certain employees. Ordinarily, these free-form employment disputes are blocked by a reasonably strong gatekeeper rule: The employee needs to at least show that they actually engaged in protected activity, and that the employer had some way of knowing about it. But without that rule, the inevitable battle of alleged secret motivations will end up being a dispute about whether an employee *ought* to have been disciplined, whether that discipline related to constitutional issues or not.

In that world, not only would the government bear the costs discussed above, but the entire dynamic of employee discipline would change for the worse. An employer would no longer be able to take *any* action without opening itself to the claim that it acted for a mistaken, unconstitutional reason. It is not clear how the employer would even insulate itself from the claims petitioner would recognize.

The adverse effects of petitioner's rule for public employers are obvious and unacceptable. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418 (citations omitted). This Court's precedents already impose restrictions that are difficult to navigate for public employers, which must assess, for example, the nature of the employee's position, whether any speech is on a matter of public concern or disruptive, and whether any discipline is imposed on the basis of an adequate investigation. *See Waters*, 511 U.S. at 692-93 (Scalia, J., concurring in the judgment). If liability could

arise from the employer's *mistaken* understanding of those and other issues, those difficulties would be multiplied.

Worse still, the new doctrine that petitioner would create seemingly would not even be limited to the public employment context. The root of such claims is the principle that "subjecting a nonconfidential, nonpolicymaking public employee to penalty for exercising rights of political association [i]s tantamount to an unconstitutional condition." *O'Hare Truck Service*, 518 U.S. at 718 (citations omitted). This Court has thus recognized that all manner of government actions can be subject to First Amendment, unconstitutional-conditions claims.[3]

There are numerous examples outside the First Amendment context as well. For example, the constitutional right to travel precludes state officials from denying certain benefits to individuals on the ground that they recently moved to the state. *See,*

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[3] *See, e.g.*, *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 161 (2013) (denial of license to practice law); *Crawford-El v. Britton*, 523 U.S. 574, 578 (1998) (correctional officer "deliberately misdirect[ing] boxes" of prisoner's personal belongings during prison transfer); *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 685 (1996) (non-renewal of government contract); *O'Hare Truck Svc.*, 518 U.S. at 726 (termination of at-will contract); *Lyng v. Intn'l Union*, 485 U.S. 360, 364 (1988) (denial of food stamps); *Am. Party of Texas v. White*, 415 U.S. 767, 780 (1974) (denial of place on ballot); *Healy v. James*, 408 U.S. 169, 181 (1972) (denial of official recognition to university group); *Aptheker v. Sec. of State*, 378 U.S. 500, 505-08 (1964) (denial of passport); *Am. Comm. Ass'n v. Douds*, 339 U.S. 382, 390 (1950) (denial of benefits of federal labor law).

e.g., *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250 (1974). Accordingly, a county hospital cannot deny indigent care to a newcomer based on her having moved to the state less than a year ago. *Id.* But on petitioner's theory, it should also be unconstitutional to deny services to a lifetime resident of the state whom the hospital wrongly *believed* was a recent immigrant to the state.

In all those other contexts, a plaintiff who does not actually engage in any constitutionally protected activity would logically now be able to assert a claim under Section 1983 on the ground that the government mistakenly thought he had. But there is of course no precedent allowing such a claim in any context, even though the individual generally has a *stronger* claim in those other settings, in which there is no countervailing governmental interest in managing the public workforce:

> Our unconstitutional conditions precedents span a spectrum of government employees, whose close relationship with the government requires a balancing of important free speech and government interests, to claimants for tax exemptions, users of public facilities, and recipients of small government subsidies, who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing.

Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 680 (1996) (citations omitted).[4] Petitioner's rule is thus

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[4] Nor has the Court applied similar prophylactic rules based on officials' perception of the facts in other important contexts. For example, there would be no violation of a suspect's Fourth Amendment rights if the police found incriminating evidence through a warrantless search of what they believed to be the suspect's home if, in fact, the suspect was simply visiting the apartment for a business transaction. *See Minnesota v. Carter*, 525 U.S. 83 (1998). Whether the Constitution was violated in that circumstance depends on whether the suspect was in fact exercising his right to constitutionally protected privacy within his own home. *Id.* at 90. Similarly, there would be no Sixth Amendment violation in questioning a suspect outside the presence of his lawyer if the suspect had not invoked his right to counsel, even if the investigators wrongly believed he *had* invoked that right. *See Montejo v. Louisiana*, 556 U.S. 778, 786, 789 (2013) (prohibition against police questioning defendant outside presence of counsel only applies after defendant invokes his right to counsel). And there would be no violation of the Double Jeopardy Clause in bringing a second prosecution against a defendant for what is, in fact, a different offense, even if the prosecutors honestly believed they were the same offense. *See, e.g.*, *Brown v. Ohio*, 432 U.S. 161, 166 (1977) (test for double jeopardy violation turns on whether "two offenses are sufficiently distinguishable"). In each of these examples, one could say that the government official was acting with an impermissible motive. And subjecting such officials to liability, despite the fact that they did not actually violate anyone's constitutional rights, could be said to serve an important deterrent effect, making clear to those who actually *do* qualify for constitutional protection that their right to do so is vigorously enforced. While those justifications might form the basis of prophylactic legislation, they do not suffice to transform what was, at most, an *attempted* constitutional violation into an actual one.

both novel and dangerous in *all* of the myriad contexts in which it would logically apply.

III. Petitioner's Arguments In Support Of His Novel Theory Lack Merit.

A. The Precedents Cited By Petitioner In Fact Preclude Recognizing His Claim.

Petitioner cannot identify any decision of this Court recognizing a claim resembling the one he asserts. He suggests that his position is supported by statements in this Court's decisions to the effect that a First Amendment claim arises when a public employer disciplines an employee "because" of his protected First Amendment activity. Pet. Br. 21. In his view, that language treats the employer's motivation as dispositive. *Id.* That is not correct. Consistent with all of the Court's uniform decisions articulating and applying the governing rule, that language refers to instances in which the employee in fact engages in constitutionally protected conduct. As the Court has explained, with emphasis notably in original: "The First Amendment's guarantee of freedom of speech protects government employees *because* of their speech on matters of public concern. To prevail, an employee must prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in the termination." *Umbehr*, 518 U.S. at 675 (emphasis in original) (citations omitted).

Petitioner fares no better with his argument that this Court adopted the rule he advocates in two decisions. Principally, he cites *Waters v. Churchill*, 511 U.S. 661 (1994). In a sense, *Waters* presented the reverse of this case: the employee allegedly

engaged in in conduct that was constitutionally protected, but the government disciplined him in the mistaken belief that it was not. A four-Justice plurality concluded that the employer's belief was a defense to the employee's First Amendment claim, so long as it was based on a reasonable investigation in the circumstances. *See id.* at 677-79. Three Justices concluded that the employer's belief alone was sufficient to defeat liability. *Id.* at 686-89.

With almost no explanation, petitioner cites *Waters* as standing for the proposition that "[w]here a public employee is fired due to a supervisor's misperception of what the employee said or did, it is the supervisor's perception that matters." Pet. Br. 14. Petitioner apparently believes that because this Court discussed the employer's motivation, it held that was the only relevant question under the First Amendment. That is obviously wrong. The essential premise of *Waters* was that the employee – in stark contrast to petitioner – *had* engaged in constitutionally protected activity. The open legal question before the Court was whether, on that premise, the employer's understanding of the facts could nonetheless defeat the worker's claim. The Court certainly did not hold, as petitioner insists, that a public employee has a First Amendment claim if he does *not* engage in constitutionally protected activity but the employer concludes otherwise without conducting a reasonable investigation. Simply put, *Waters* holds that the employer's retaliatory motivation under the First Amendment is a *necessary* condition for a claim, not a *sufficient* one.

Petitioner thus ignores that every member of the Court in *Waters* made clear that, whatever the

government's belief, the employee must prove at the threshold that her speech was protected by the First Amendment. The plurality expressly concluded that, wholly apart from the employer's motivation, the employee *could not* attempt to establish liability based on "speech that was either not on a matter of public concern, or on a matter of public concern but disruptive." *Waters*, 511 U.S. at 681. Further, the employee's remaining claim that she had been terminated for other, constitutionally protected speech than that addressed by the Court's decision would turn on "whether those statements were protected speech, a different matter than the one before us now." *Id.* at 682. *See also id.* at 685 (Souter, J., concurring) (explaining that plurality opinion, which he joined, permitted liability only "assuming in each case that the speech was actually on a matter of public concern").

More broadly, the plurality reiterated that the Court has "never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information." *Waters*, 511 U.S. at 679. Such claims, it explained, were properly brought "under states contract law, or under some state statute or common-law cause of action," or perhaps even "a federal statutory claim. Likewise, the State or Federal Governments may, if they choose, provide similar protection to people fired because of their speech. But this protection is not mandated by the

Constitution." *Id.*[5] Consistent with that understanding, the plurality explained that – wholly apart from any improper motivation by the government – the Court had "refrained from intervening in government employer decisions that are based on speech that is of entirely private concern." *Id.* at 674.

Next, Justice Scalia's opinion for three Justices explained that under the Court's ruling, even if the employer acted with an improper motivation, "presumably, the dismissal can still proceed even if the speech was not what the employer had thought it was, so long as it was not speech on an issue of public importance." *Waters*, 511 U.S. at 688. Liability for wrongful discharge would depend on "the protected speech that the jury later finds." *Id.* at 694. This is essentially the exact opposite of the rule the petitioner asserts here, and for which he claims support in *Waters*.

Even Justice Stevens's dissenting opinion for two Justices, which took the broadest view of employees' First Amendment rights, concluded that "[t]he critical issues in a case of this kind are (1) whether the speech is protected, and (2) whether it was the basis for the sanction imposed on the employee."

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[5] Petitioner contends that this language refers to a claim under the Due Process Clause. Pet. Br. 25. That is not accurate. No such claim was asserted in *Waters*. The relevant passage discusses only free speech. And the Court's recognition that an employer's mistake is not a basis for a claim closely tracks its prior conclusion to the same effect in *Connick*. *See supra* at 19.

Waters, 511 U.S. at 695. Liability in the case therefore depended on the "assum[ption] that [the employee's] statements were fully protected by the First Amendment." *Id.* The dissent similarly understood the majority to apply only to "speech that was in fact protected." *Id.* at 698 n.4.

Finally, petitioner ignores that the reason the Court took the employer's subjective beliefs into account was to *mitigate* the burdens of allowing public employees to challenge employment decisions on First Amendment grounds. *See Waters*, 511 U.S. at 671-77. That is, the Court allowed the employer's reasonable mistake to furnish a defense to what would otherwise be an obvious First Amendment violation, explaining that the lower court's failure to do so "gives insufficient weight to the government's interest in efficient employment decisionmaking." *Id.* at 675.[6] The Court said nothing to suggest that it intended its decision to provide a pathway for making

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[6] Thus, under *Waters*, whether the employer made a "mistake" is relevant not to the plaintiff's claim but instead to the public employer's defense. The government is not liable if it proves that it conducted a reasonable investigation and nonetheless mistakenly concluded that the employee's conduct was not constitutionally protected. In this case, respondents assert, *inter alia*, that they have a constitutionally valid policy that high-level police officers would not be politically active. They maintain that petitioner was violating that policy or at least they made a reasonable mistake in thinking he was. But because petitioner did not engage in political association at all, what respondents did and why they did it plays no role in the First Amendment inquiry unless petitioner first proves that he engaged in constitutionally protected activity.

First Amendment claims against government employment decisions easier and more abundant.

Petitioner also relies on *Rankin v. McPherson*, 483 U.S. 378 (1987). Pet. Br. 15. The plaintiff in *Rankin*, a clerical employee in a constable's office, was terminated for saying that if an attempt was made on the President's life, "I hope they get him." 483 U.S. at 380. The Court concluded without difficulty that the potential assassination of the President was obviously a matter of public concern. *Id.* at 388. It expressly held – in direct conflict with petitioner's argument in this case – that the protected nature of the employee's speech was a precondition to her claim: "The threshold question in applying [the *Pickering*] balancing test is whether [the employee's] speech may be fairly characterized as constituting speech on a manner of public concern." 483 U.S. at 384 (citations and internal quotation marks omitted).

According to petitioner, the "important thing" in *Rankin* "was the constable's perception of the clerk's speech, not the clerk's intent in speaking." Pet. Br. 15. That gets *Rankin* backwards: *Rankin* expressly held that the only aspect of the employer's perception at issue in the case – its subjective belief that the employee's speech showed that she was unsuitable for a law enforcement workplace – was *un*important, given the employee's mere clerical role. 483 U.S. at 390.

Petitioner argues that his position is also supported by the principle that "'there is no requirement that [employees] . . . have been coerced into changing, either actually or ostensibly, their political allegiance.'" Pet. Br. 16 (quoting *Branti*, 445

U.S. at 517). But that has nothing to do with the question presented. Instead, the issue is whether the employee must have exercised First Amendment rights. Whether the employer's response changed the employee's views is irrelevant.

Respondents' further reliance on cases involving the First Amendment's protections relating to "loyalty oaths," "charitable solicitation," and "cross-burning" is unfounded. Pet. Br. 18. He explains that the Court has expressed concern with the prospect that government would misperceive the expressive activity in question. *Id.* Fair enough. But the salient doctrinal point is that the Court has never held that the First Amendment would recognize a claim on behalf of an individual who did not sign a loyalty oath but was thought to; a person who did not make a charitable solicitation but was thought to; or a person who did not burn a cross but was thought to. On petitioner's view, however, all those are cognizable constitutional claims.

Finally, petitioner argues that his position is supported by decisions such as *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), which held that broad political patronage rules violated the First Amendment. Petitioner points out that in these cases, the Court did not inquire whether each individual employee held a particular political viewpoint. Pet. Br. 20-21. But the Court has explained that there was a special reason for this, specific to the context of applying a general political affiliation test to all employees: "*Elrod* and *Branti* involved instances where the raw test of political affiliation sufficed to show a constitutional violation . . . . There is an advantage

in so confining the inquiry where political affiliation alone is concerned, for one's beliefs and allegiances ought not to be subject to probing or testing by the government." *O'Hare Truck Service*, 518 U.S. at 719. These cases thus simply hold that such sweeping rules – like the mass firing petitioner hypothesizes, Pet. Br. 10 – are invalid because they undoubtedly violate the associational rights of numerous employees, and under the First Amendment, it is preferable not to require each individual one to prove his political associations. Critically, however, the Court did not deny that "it is inevitable that some case-by-case adjudication will be required even where political affiliation is the test the government has imposed," *id.* – for example, for an individual employee to receive damages.[7] And, in fact, this Court has rejected the indistinguishable argument that the breadth of those rulings makes it irrelevant whether the individual employee held a position that was susceptible of political hiring. *Id.*

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[7] Those decisions would control the case petitioner hypothesizes in which a public employer terminates an entire workplace. Petitioner notably does not allege that respondents applied any such sweeping patronage rule in this case or otherwise broadly sought to compel police officers to support the mayor in the election. The case accordingly does not present the question whether he would have a claim despite the fact that he had no relevant political association if he had been transferred pursuant to a policy that was unconstitutional as applied to other employees.

B. Petitioner's Policy Arguments Lack Merit.

1. Petitioner argues that his proposed rule is important prophylactically, so that public employees do not fear being disciplined on the basis of mistaken information. That argument could not justify a departure from the Constitution's text, historical understanding, and this Court's precedents. In particular, the Court has never suggested that prophylactic concerns could justify recognizing a claim on behalf of public employees who do not actually exercise any constitutional rights.

The public employment context is a particularly poor one in which to enact such prophylactic rules. The Court has repeatedly held that when the government acts as an employer rather than as a sovereign, it needs far *greater* leeway than the ordinary application of constitutional rules would afford.[8] On that basis, this Court has refused to find a First Amendment violation, for example, when the employee does not personally exercise any constitutional right, without regard to whether extension of such rights might give public employees greater confidence in their ability to engage in expression. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court held that the Constitution does not restrict discipline arising from a public employee's

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[8] The question in this case, then, is not whether ordinary citizens are protected against government sovereign actions based on mistaken perceptions of a person's associations or political activities. This Court can decide that question in a future case in which it is properly presented.

speech in the course of his job responsibilities, rather than in his capacity in a citizen. In language that fully applies to this context, the United States argued that because "[c]onstitutional rights are personal," U.S. Br. 9, *Garcetti v. Ceballos*, *supra*, an employee speaking within the context of his job responsibilities has no First Amendment claim because he "has no First Amendment interest in his speech," *id.* 10. This Court agreed. "*So long as employees are speaking as citizens about matters of public concern*, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti*, 547 U.S. at 419 (emphasis added) (citations omitted).

Numerous other potential prophylactic rules might further First Amendment values. For example, the Court could recognize that even trivial disciplinary action or criticism violates the First Amendment if politically motivated. But instead, a claim arises only if the public employee is subject to a material adverse employment action. *See supra* 22. That is so because of the well-established, "'common-sense realization' that if every 'employment decision became a constitutional matter,' the Government could not function." *NASA v. Nelson*, 562 U.S. 134, 149 (2011) (quoting *Connick*, 461 U.S. at 143).

Petitioner's contrary policy arguments also rest on the unrealistic premise that such claims would always be asserted *accurately*. He ignores the inevitable disruption created by the many cases in which public employers are subject to false claims or fear they might be. This Court has already balanced the interests of public employees against the prospect that such claims could disrupt the orderly function of

governmental workforces. It has concluded that the balance is properly struck by limiting constitutional liability to cases in which the employee exercised or sought to exercise constitutional rights.

Further, petitioner's rule seeks to encourage acts of public employees that are not a concern of the First Amendment. He offers hypotheticals like the conservative employee who is afraid to drive a Toyota Prius for fear of being perceived as a liberal. Pet. Br. 26. The straightforward answer is that the Constitution was not adopted to encourage public employees to drive electric cars. That is the workaday concern of other civil service protections. And, of course, if an employee actually did drive a Prius as a form of political association, and was disciplined because of that Prius-based association, rejecting petitioner's rule would not destroy that (unlikely) claim insofar as driving a Prius is a form of protected expression (which, one hopes, it is probably not).

2. In any event, a prophylactic rule like the one petitioner proposes "is justified only by reference to its prophylactic purpose and applies only where its benefits outweigh its costs." *Maryland v. Shatzer*, 559 U.S. 98, 106 (2010) (citation and internal punctuation omitted).

Here, the harm his rule would cause is grossly disproportionate to any prophylactic benefit it would provide. The benefit of petitioner's prophylactic rule is modest at best. As discussed, this Court's precedents already protect a public employee who is disciplined based on a misunderstanding of the precise nature of the employee's speech or association. The question presented by this case

arises only when the employee does *not* engage in speech or association, but the employer mistakenly believes he has.

Petitioner argues that unless this Court recognizes a constitutional tort for such mistakes, the genuine exercise of First Amendment rights might be "chilled." Pet. Br. 26. But he provides no evidence of such a chilling effect, doubtless because employees frequently have *other* non-constitutional remedies for such mistreatment. Federalism works here. Employees like petitioner, who do not seek to engage in any First Amendment activity, are frequently protected by measures adopted through legislation and negotiation, such as widespread civil service rules and collective bargaining agreements. That is so because "the government may certainly choose to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment." *Waters*, 511 U.S. at 674 (plurality opinion) (citations omitted).

"The dictates of sound judgment are reinforced by the powerful network of legislative enactments – such as whistle-blower protection laws and labor codes – available to those who seek to expose wrongdoing." *Garcetti*, 547 U.S. at 425 (collecting illustrative citations). Ordinary civil service protections are well designed to ensure that employees are not disciplined or terminated for erroneous or improper reasons, without turning every such allegation into a federal case. State law may provide further protections. New Jersey, for example, provides a state law cause of action for an "attempt" to violate an individual's civil rights under

the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 et seq. That claim arguably describes petitioner's allegations, which assert that respondents unsuccessfully sought to violate his rights. Petitioner for his own reasons did not assert such a claim in his complaint. But even when such remedies are unavailable, they will often not be necessary, because when an employer disciplines an employee in good standing based on mistaken information, it is likely to learn of the mistake and correct it.

Accordingly, it is no surprise that petitioner is unable to marshal any evidence of a pattern of public employers acting on the basis of a misunderstanding that employees have engaged in constitutionally protected speech or association. *Compare, e.g.*, U.S. Br. 20, *Lane v. Franks*, *supra* (describing the benefits of recognizing a First Amendment right to provide grand jury testimony, because "[t]he more than 1000 prosecutions for federal corruption offenses that are brought in a typical year often depend on evidence about activities that government officials undertook while in office" (citation omitted)).

At the same time, the costs of petitioner's prophylactic rule are enormous. The Constitution ordinarily leaves the government, like private employers, free to manage its workforce as it sees fit. "The government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption. And, absent contractual, statutory, or constitutional restriction, the government is entitled to terminate them for no reason at all." *Umbehr*, 518 U.S. at 674.

This Court, in turn, has repeatedly warned against constitutionalizing the employee grievance process, and thereby disrespecting the prerogatives of state and local governments to manage their affairs and discouraging efforts to resolve such questions through the democratic process and labor negotiation. It has rejected rules like petitioner's, which "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight." *Garcetti*, 547 U.S. at 423. "To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Id.*

In sum, there is (of course) no evidence that public employers are seeking out and targeting for discipline the subset of employees like petitioner who are not politically neutral but instead agnostic. To the extent it occurs, ordinary civil service protections are sufficient. If not, they can be adjusted. And to the extent employers seek to discipline employees based on their political affiliations, petitioner's rule adds nothing because doing so accurately – which is presumably what employers are trying to do – is already fully protected by the Constitution.

3. The United States asserts that petitioner's rule is necessary to treat similarly situated employees equally. It gives as an example two employees who are terminated because they have invitations from the American Constitution Society on their desks. U.S. Br. 23. But if the second employee does *not* have any relevant political associations, then the two employees are not actually

similarly situated; the employee who has a claim is the one who was engaged in protected activity and is concerned that his employer retaliated against him, not the one who did not engage in any protected activity and is concerned that his employer is an idiot who cannot tell those with disfavored affiliations from those who get unsolicited mail.

In any event, the hypothetical actually illustrates the tumultuous effects that would arise from recognizing petitioner's claim. The United States avowedly contemplates that a public employee could bring claims on the exclusive basis that the employer believed he had political leanings based on something as innocuous as the return address on a letter on a desk, whether the employee had any relevant political affiliations or not. Everyone gets mail, drives a car, or provides some other indication that an employer could be alleged to have taken as an indication of political affiliation. Many employees who feel they have been wrongly treated will surmise that their employers have acted for some secret, invidious "reason." On the Government's view, any employee who links his disappointing treatment to the employer's awareness of any of these clues and potential miscues about political association has a basis to file a lawsuit and take discovery on the alleged motives for why they did not get what they sought from the government. The volume of litigation, and the extraordinary disruption to the orderly management of government workplaces that would result, is obvious. By contrast, if the employee must at least prove that they were actually engaged in protected activity and that there is some factual theory connecting that activity to the government's

action, then at least some of the least plausible claims can be weeded out at the outset.

IV. If This Court's Existing Precedents Compel Recognition of Petitioner's Claim, They Should Be Overruled.

If despite the foregoing, this Court were to conclude that petitioner's rule is compelled by its prior decisions in the public employment retaliation line of cases, then those decisions should be overruled.

Prior to *Elrod*, there was no doubt regarding the constitutionality of political patronage – *i.e.*, making personnel decisions based on political affiliation, a practice that is "as old as the Republic" itself, which has "contributed significantly to the democratization of American politics." *Elrod*, 427 U.S. at 376 (Powell, J., dissenting). In *Elrod*, a plurality of this Court upended that settled understanding, and the result has been a "shambles": an unworkable hodge-podge of rules and tests that have left both employers and employees "utterly in the dark" about their rights and obligations, thus breeding unnecessary litigation – and provoking forceful dissents – every time the Court extends *Elrod* to a new context. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 111-12 (1990) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J., and O'Connor, J., in part). Petitioner's rule, which would substantially expand the right recognized in those cases to public employees and contractors who do not even engage in constitutionally protected activity, would for the reasons given above depart even further from the Constitution's text and history and would impose still

greater burdens on government agencies. "The doctrine of stare decisis allows us to revisit an earlier decision where experience with its application reveals that it is unworkable." *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). If they extend so far as petitioner suggests, *Elrod* and its progeny should be overruled because they impose rigid and unworkable constitutional rules on employment decisions that are properly regulated by statute and ordinance.

Elrod principally justified the decision to abandon more than a century of consistent practice by deciding that political patronage is so obnoxious that the federal courts should recognize a First Amendment right on behalf of employees who exercise their rights of political association. That is a non sequitur because even if patronage is a bad way to make employment decisions, that does not mean that it violates the First Amendment. The contrary argument, that patronage decisions impose unconstitutional conditions on government employment, fails to account for the government's need for autonomy in making employment decisions – a need this Court has acknowledged at least since *Pickering*, 391 U.S. at 568, and recently re-emphasized in *Garcetti*, 547 U.S. at 420. A view grounded in historic tradition, understanding that patronage has always been part of American political life and public employment, far better accounts for that pressing state interest.

Moreover, the strident criticism of the patronage system is misplaced. While *abuse* of patronage undermines good governance, there are important respects in which patronage has been – and can be – valuable and appropriate. Patronage creates

incentives for political participation, and also helps to produce cohesive and effective political parties, thus furthering First Amendment values. *See Elrod*, 427 U.S. at 385 (Powell, J. dissenting). Patronage makes it more likely that public employees will be accountable to voters, and therefore likely to implement democratically favored policies. And patronage can also make it more likely that employees will be committed to their superiors and their workplaces, thus improving the efficiency of government.

Indeed, *Elrod* and *Branti* themselves acknowledged the benefits of patronage when they permitted patronage-based decisions vis-à-vis policymaking and confidential employees for whom political affiliation is a job requirement. But that rule is unworkable because courts cannot reliably distinguish "good" patronage from "bad," and so the same job is sometimes deemed political, and other times not, based on the sensibilities of the judge considering the issue or idiosyncratic facts. *See Rutan*, 497 U.S. at 111-12 (Scalia, J., dissenting) (documenting multiple illustrative examples of ambiguous positions, including deputy sheriffs, attorneys, clerks, bailiffs, and other public employees). The problem is especially pronounced in the early stages of federal civil rights litigation, where a plaintiff's allegations are the only information available to the court, and so the result may turn on a plaintiff's skill in pleading – even if the facts alleged are false. *See Umbehr*, 518 U.S. at 710 (Scalia, J., dissenting).

Elrod and *Branti* also impose substantial unnecessary litigation risk on government agencies.

These cases raise the specter of federal constitutional litigation any time a public employer makes an adverse employment or contracting decision. Agencies may thus hesitate before making decisions that are in the public interest. And once they do make the decision, former employees or losing contractors – who have little to lose – have every incentive to litigate, even if their sole goal is to coax a settlement out of the government. If petitioner prevails, the problem will only get worse because a plaintiff only needs to allege an unlawful motivation – and not that he actually has any meaningful political affiliation. Applying petitioner's motivation-based version of *Elrod* and *Branti* thus risks miring public agencies in unnecessary litigation as they attempt to conduct their everyday affairs.

Elrod and *Branti* are not only unworkable, but also unnecessary because there is an obvious alternative to constitutionalizing public employment decisions. Legislatures at the federal, state, and municipal levels have enacted protections for civil servants, and public sector unions have in many cases bargained for enhanced protections for their members. If *Elrod* and its progeny are overruled today, many employees will not notice any difference because they already have statutory protections. To the extent additional protections are appropriate, lawmakers have all the power they need to enact those rules. These legislative solutions can be tailored to address the circumstances in which patronage poses a threat to good governance, while preserving the pre-*Elrod* status quo in situations in which patronage may be helpful or necessary. *See Rutan*, 497 U.S. at 94 (Scalia, J., dissenting). There is

nothing constitutionally offensive about leaving such political questions to the people.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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